EXHIBIT 2

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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NEXTG NETWORKS OF NY, INC., Plaintiff,	:	03 CIVIL 9672 (RMB)
-against-	:	**PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**
CITY OF NEW YORK; CITY OF NEW YORK DEPARTMENT OF INFORMATION TECHNOLOGY AND TELECOMMUNICATIONS; and GINO P MENCHINI, in his official capacity, Defendants.	:	

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Plaintiff, NextG Networks of NY, Inc. ("NextG"), by its attorneys, Ingram Yuzek Gainen Carroll & Bertolotti, L.L.P. and Cole, Raywid & Braverman, L.L.P., submit this brief in support of NextG's Motion For Preliminary Injunction ("Motion") against Defendants City of New York ("City"), the City of New York Department of Information Technology and Telecommunications ("DoITT"), and Gino P Menchini (jointly "Defendants" or "City")

I. OVERVIEW OF CASE AND NEED FOR PRELIMINARY INJUNCTION

A. Introduction

NextG brings this motion for preliminary injunction because after nearly two years of attempting to work with the City, NextG is still prohibited from constructing its network in the public rights-of-way and from providing telecommunications services in the City Indeed, until NextG raised the issue of this motion, by the City's own admission, NextG could not even apply for the franchise the City requires. As a result of the City's actions and the facial requirements of the City's laws, NextG cannot do any business, and its reputation and goodwill as a viable provider of telecommunications services is being irreparably harmed.

As fully set forth below and in NextG's First Amended Verified Complaint, the City's legal requirements and actions in this case present potentially the most egregious and patent violation of Section 253 of the Communications Act, 47 U.S.C. § 253, yet seen in the eight year history of that provision. The City's steadfast refusal to even allow NextG to apply for, much less receive, a franchise to provide telecommunications services involving wireless facilities clearly prohibits NextG from providing telecommunications services in violation of Section 253. In addition, the City's regulations facially violate Section 253 and are squarely on point with the regulations found to facially violate Section 253 by the Second Circuit in *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67 (2d Cir. 2002), *cert. denied*, 538 U.S. 923 (2003). *See also*, *New Jersey Payphone Assn, Inc. v Town of West New York*, 299 F.3d 235 (3d Cir. 2002).

Finally, the City's enforcement of its requirements prevents NextG from competing on a fair and balanced regulatory basis with its primary competitor, Verizon, which uses the public rights-of-way without complying with the panoply of regulations that are imposed as barriers to NextG.

Accordingly, NextG respectfully requests that this Court grant it a preliminary injunction to allow NextG to exercise its right to provide telecommunications service using facilities in the public right-of-way in the initial area set forth below during the pendency of this matter.

B. NextG Is A Telecommunications Provider That Must Have Access To The Public Rights-Of-Way

NextG provides telecommunications services. (Affidavit of Robert L. Delsman ¶ 5 ("Delsman Aff") submitted simultaneously herewith). Specifically, it is a "carrier's carrier." (*Id* ¶ *8*). That means that NextG provides telecommunications services to wireless carriers in the form of transport from wireless receiving devices to the public telecommunications network via fiber optic transmission lines that connect the wireless reception devices to points where the wireless carriers' signals interconnect with local or interstate telecommunications networks.[1] (*Id* ; Affidavit of David Cutrer ¶ 12 ("Cutrer Aff.") submitted simultaneously herewith). While NextG's service may include owning the wireless reception devices, NextG is not a provider of commercial mobile radio service ("CMRS"). (Delsman Aff. ¶ 8). In other words, it is not a wireless provider.

Indeed, NextG's provision of service is different from traditional wireless and/or cellular networks In order to construct, operate, and maintain its facilities, and therefore to provide telecommunications services, NextG requires access to public rights-of-way, including but not limited to utility or street light poles located in the public rights-of-way. (Cutrer Aff. ¶¶ 15-16).

[1] On April 4, 2003, NextG was issued a certificate of public convenience and necessity by the New York Department of Public Service to operate in New York State as a facilities-based provider and reseller of telephone service, without authority to provide local exchange service.

Traditional cellular or wireless providers serve an area using wireless equipment located at higher elevations, for example on the rooftops of high rise buildings (*Id* ¶ 10). This configuration allows a single "cell" to cover a larger area, but it has limitations in its ability to offer higher bandwidth, and to provide service to certain "dead spots." (*Id.* ¶¶ 10-11). Unlike traditional architecture, NextG seeks to provide its service by combining a fiber optic ring and multiple small antennas and conversion equipment, covering much smaller areas than traditional cellular/wireless services. (*Id* ¶¶ 12-14) In order to provide its service, however, NextG must place its facilities substantially closer to the ground and in closer proximity to one another (*i.e.* using smaller "cells") (*Id.* ¶ 16). NextG also requires access to the public rights-of-way to install the fiber optic portion of its network. (*Id.* ¶ 12).

Accordingly, NextG's service and network must use traditional utility poles or street light poles. (*Id.* ¶¶ 8, 15-16). In order to use such poles, and also in order to place its fiber optic lines, NextG must have access to public rights-of-way. (*Id* ¶¶ 15-16) While NextG could install its own utility poles, in this case, it understands that the City will not permit it to do so. (Delsman Aff. ¶ 10). Thus, NextG must use the street light, traffic signal, and similar poles constructed in the public rights-of-way by the City

Indeed, because those poles owned by the City are the only way to access the public rights-of-way above ground, they are part and parcel of the right-of-way, precisely like the sidewalks and streets. The City's enactments recognize this fact. For example, the City's Resolution No. 957 (discussed below) authorized the City's Department of Information Technology and Telecommunications ("DoITT") to issue Requests For Proposals ("RFP") and franchises for "the installation of telecommunications equipment and facilities on, over and under the ***inalienable property*** of the City, in connection with the provision of mobile telecommunications services in the City of New York." (Resolution No. 957 p. 1 (Affidavit of T. Scott Thompson, Exh. 2) (emphasis added)). Pursuant to Resolution No. 957, on February 9, 2004 DoITT issued an RFP (discussed below), regarding the issuance of franchises for the use of "inalienable property of the City," specifically, Street Light Poles. Section 383 of the City Charter defines "inalienable property of the City" as "The rights of the city in and to its water front, ferries, wharf property, bridges, land under water, public landings, wharves, docks, **streets,** avenues, highways, parks, waters, waterways and all other public places are hereby declared to be inalienable." (City Charter § 383 (Thompson Aff., Exh 1)(emphasis added)). Accordingly, under DoITT's own most recent RFP, the Street Light Poles, Traffic Light Poles And Highway Sign Support Poles owned or controlled by the City are defined as the same as the streets, thus emphasizing that such poles are parts of, and included in, the public rights-of-way. (Throughout this Brief, NextG's use of the phrase "public rights-of-way" is intended to include poles owned by the City in the public rights-of-way)

C. The City's Unlawful Regulatory Scheme

The City of New York, through various enactments and regulations, has established a complex and burdensome scheme whereby the City exercises unfettered discretion over which entities are permitted to access the public rights-of-way and to provide telecommunications services, as well as then regulating the entities and their provision of such services. On their face and as a matter of law Defendants' enactments and regulations have the effect of prohibiting the ability of entities, including NextG, to provide telecommunications services.

In summary, the City's complex of regulations provides that before an entity can provide telecommunications services while occupying the public rights-of-way, the entity must get a franchise. Before an entity can get a franchise, however, the City Council must issue authorizing legislation empowering DoITT to grant such a franchise. Then, even if the City Council so empowers DoITT, still no entity can obtain a franchise until DoITT issues an RFP that follows the terms of the Council's authorizing legislation. Only after DoITT issues the RFP can an entity even apply for a franchise. Such an application is then subject to review and approval by several layers of the City government, with discretion being reserved to each reviewing layer to reject the application based on undefined standards.

The specific enactments challenged in this case are contained in the City's Charter, Resolution No. 957, and the RFP issued by DoITT on February 9, 2004. Section 1072(c) of the City Charter empowers DoITT to "administer all franchises . . . relating to telecommunications pursuant to chapter fourteen, including without limitation, **selecting telecommunications franchisees**. . ." (Charter § 1072 (Thompson Aff. Exh. 1))(emphasis added). Section 363 of the City Charter provides that a franchise shall be awarded only in accordance with the provisions of an authorizing resolution adopted by the City Council. Section 363(b) provides that an initial determination of the need for a franchise shall be made by the head of the agency designated by the Mayor.

Moreover, before any franchise can be finally granted, it must be subject to a public hearing (Charter § 371), separate approval by the Mayor (*id.* § 372), and review and approval by the Franchise and Concession Review Committee (*id.* § 373). Thus, under the City Charter, an applicant's franchise could be denied at the public hearing stage, by the Mayor, or by the Franchise and Concession Review Committee.

On August 11, 1999, the City Council of the City of New York passed Resolution No. 957 (Thompson Aff. Exh. 2). Resolution No. 957 authorized DoITT to grant franchises for the installation of telecommunications equipment and facilities on, over, and under the "inalienable property" of the City in connection with the provision of "mobile telecommunications services" in the City. Resolution No. 957 provides that franchises, in addition to requiring the approval of DoITT, "shall require the approval of the Franchise and Concession Review Committee and the separate and additional approval of the Mayor " (Res. No. 957 p. 2 (page numbers refer to copy of Resolution at Thompson Aff., Exh. 2)).

Resolution No. 957 further provides that the authorization to grant franchises pursuant to the Resolution "shall expire on the fifth anniversary of the date on which this resolutions is adopted, . ." and "[n]o franchise shall be granted pursuant to this resolution by [DoITT] nor approved by the Franchise and Concession Review Committee, or the Mayor after the Expiration Date." (*Id.* p. 2). Thus, after August 11, 2004, no entity will be permitted to enter into a franchise allowing it to provide telecommunications services via mobile telecommunications services facilities located in the public rights-of-way, unless or until the City Council adopts a new authorizing resolution

Resolution No. 957 provides that "[p]rior to the grant of any such franchise, a request for proposals ("RFP") or other solicitation **shall** be issued by [DoITT]." (*Id.* p. 2)(emphasis added). Thus, NextG could not apply for or obtain a franchise to provide telecommunications services in connection with "mobile telecommunications services" unless and until DoITT issued an RFP or other solicitation. Despite NextG's constant efforts and requests, prior to February 9, 2004, DoITT had never issued an RFP pursuant to Resolution No. 957. (Delsman Aff. ¶¶ 11-18).

Resolution 957 finally sets forth mandatory criteria that DoITT must use to evaluate responses to an RFP. (Res. No. 957 p. 2). The Resolution also sets forth specific provisions that must be contained in any franchise granted by DoITT. (*Id.* pp. 2-3) Moreover, Resolution No. 957 grants DoITT unfettered discretion to require any other provision in a franchise as a condition of the ability of an entity to providing telecommunications services. (*Id.* (terms "shall include, but not be limited to") As demonstrated below, the criteria and franchise provisions set forth in the Resolution facially violate Section 253, as a matter of law.

D. NextG's Attempts To Obtain The City's Consent To Construct In The Public Rights-Of-Way

Despite the fact that the City's requirements are unlawful, since March 2002, NextG has continuously sought to obtain approval from the City to construct its facilities in the public rights-of-way to provide telecommunications services in the City. (Delsman Aff. ¶¶ 11-18). During that time, NextG has attempted to work with DoITT and other City officials to bring about the issuance of a lawful RFP, and has even attempted to engage City officials, such as the Mayor, to bring to their attention the public benefits of NextG's services, and the roadblock that NextG faced. (*Id* ¶ 16) Indeed, on June 21, 2002, NextG submitted to DoITT a formal application seeking a mobile telecommunications services franchise Because there had been no RFP issued by DoITT, however, the City refused to accept NextG's application. (*Id.*¶ 15)

After submitting its attempted application, NextG continued to attempt to work with the City for an informal settlement of the impasse. (*Id.* ¶ 16). While no date certain was ever promised, during the course of discussions, NextG was repeatedly told or led to believe that the necessary RFP would be issued shortly. (*Id.* ¶ 13) Yet, before NextG sought this preliminary injunction, DoITT had never even issued an RFP, much less a franchise, and thus, NextG had no choice but to finally bring this lawsuit to protect its rights. (*Id.* ¶¶ 11-18).

E. DoITT Releases An RFP In An Attempt To Answer NextG's Preliminary Injunction Motion

On February 9, 2004, after the filing of NextG's initial Complaint in this case, after NextG had written the Court requesting a pre-motion conference to move for preliminary injunction, and one day before Defendants' response to NextG's request was due to the Court, DoITT released a "Request For Proposals For Franchise For The Installation And Use, On City-

Owned Street Light Poles, Traffic Light Poles And Highway Sign Support Poles, Of Telecommunications Equipment And Facilities, Including Base Station And Access Point Facilities, In Connection With The Provision Of Mobile Telecommunications Services" ("2004 RFP") [2] (Thompson Aff Exh. 3).

There are numerous problems with the 2004 RFP under settled law. First, the RFP is wholly illusory and would permit DoITT to exercise unfettered, unchecked control over NextG's entry. For example, in Section 2 of the 2004 RFP, "DoITT reserves, to the fullest extent permitted by law, the right to select no proposals, one proposal or multiple proposals." In Section 3 of the 2004 RFP, "DoITT RESERVES THE RIGHT TO CANCEL OR AMEND THIS RFP AT ANYTIME[sic]." (Emphasis in original). And in Section 4(j) of the 2004 RFP, "DoITT reserves the right to postpone or cancel this RFP and to reject all proposals at any time." In light of DoITT's reservation of the right to unilaterally cancel or terminate the RFP, and/or reject any or all proposals for any reason, the 2004 RFP is illusory and meaningless.

Moreover, the timeframe of the RFP (in addition to being suspect in light of the timing in this case) is essentially unworkable. Applications responsive to the 2004 RFP must be submitted no later than 5pm on April 9, 2004. (2004 RFP § 3). Yet, DoITT's authorization to issue a franchise under Resolution 957 expires on August 11, 2004. Given the complex and multilayered negotiations and approvals required, Defendants cannot possibly issue a franchise pursuant to the 2004 RFP and Resolution No. 957 before the authorization to do so expires on August 11, 2004.

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[2] It is clear from the timing of the 2004 RFP's release that it was not done in good faith. NextG had sought leave from the Court to file this motion, and the Court had order the City to respond to NextG's request by February 10, 2004 The City's release of the 2004 RFP on February 9, 2004, was intended to allow the City to raise the issuance of the RFP in hopes of thwarting NextG even bringing this motion.

The RFP also sets forth various minimum obligations and the standards that DoITT will use to evaluate applications. Section 8(b) of the 2004 RFP sets for the "minimum" contents that an application must contain.

- A "Technical Proposal," including, for example, information describing "**the services to be provided** by such equipment and facilities, including the extent to which such equipment and facilities will be capable of serving multiple telecommunications service providers." (§ 8(b)(1) (emphasis added)).
- A "Legal and Managerial Proposal," including, for example, information describing the managerial experience and capabilities of the applicant, describing whether the facilities proposed will be serving one or multiple telecommunications providers, business references, and **a list of services provided** (§ 8(b)(2)).
- A "Financial Capacity Proposal," (§ 8(b)(3)).
- A "Compensation Proposal," describing the compensation the applicant is "prepared to offer" the City, including both a per pole compensation element and a minimum compensation element. (§ 8(b)(4)).

DoITT also reserves the right to require the submission of additional information from any applicant during the Evaluation Period. (2004 RFP § 4(h)).

Section 8(c) then sets forth the criteria to be used by the "Evaluation Committee" in evaluating each application. The criteria listed include:

> "(1) the financial, legal, technical and managerial experience and capabilities of the proposer; . . .
> (3) the adequacy, amount and value of the proposed compensation to be paid to the City;
> (4) the value of any telecommunications facilities and services offered to the City by the proposer;
> (5) the value, efficiency and scope of the public service to be provided . . ; and
> (6) the extent to which the facilities proposed to be installed will serve multiple mobile telecommunications service providers "

Yet, the 2004 RFP does not provide a copy of a model franchise or otherwise specify terms that Defendants will require. Thus, NextG and other entities have no meaningful guidance regarding what requirements will actually be imposed as a condition of access to the public rights-of-way in relation to the 2004 RFP.

Ultimately, the RFP creates a situation where providers are forced into blind bidding for access to public rights-of-way. The RFP does not identify or make public the amount of compensation that an entity will be required to pay the City. Rather, the RFP sets up a blind bidding situation, where each applicant must propose a compensation amount. (2004 RFP §§ 7, 8(b)(4)). In addition, while not identifying specific "in-kind" compensation that is required, the RFP makes clear that such compensation is essentially mandatory, as Defendants will evaluate the applications based on the monetary compensation offered as well as the value of any telecommunications facilities and services offered by the applicant to the City. (*Id.* § 8(c)(4)). While DoITT provides no guidance, the RFP clearly asserts that compensation to the City for use of the facilities in the public rights-of-way should be at least comparable to that paid by mobile telecommunications providers for placement of facilities on private property, in comparable areas. (*Id* § 7(a)). In addition, the RFP asserts that any franchise granted will include a minimum franchise compensation obligation, but does not identify what would constitute an acceptable level of minimum compensation. (*Id.* § 7(b)). Ultimately, DoITT admits to anticipating a bidding war for exclusive access to locations, as the RFP explains that in the event two or more franchisees seek access to the same site, allocation "will likely rely in significant part on the compensation being offered by competing applicants. . . ." (*Id.* p. 8 n.2).

II. NEXTG REQUIRES A PRELIMINARY INJUNCTION TO AVOID IRREPARABLE HARM

A. The Standard For Preliminary Injunction

To justify the issuance of preliminary injunctive relief, a party must ordinarily show: "(a) that it will suffer irreparable harm in the absence of an injunction, and (b) either (i) a likelihood of success on the merits or (ii) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the movant's favor." *Tom Doherty Assocs., Inc. v. Saban Entertainment, Inc.*, 60 F.3d 27, 33 (2d Cir. 1995); *Brenntag*

Int'l Chem., Inc. v. Bank of India, 175 F.3d 245, 249 (2d Cir. 1999). When a party seeks a mandatory injunction that will alter the status quo, it is sometimes required to meet a heighten "clear or substantial likelihood of success" standard. *See Beal v Stern*, 184 F.3d 117, 122-23 (2d Cir. 1999). However, when the injunction sought does nothing more than preserve the status quo, no heightened showing is required. *Fifth Ave. Presbyterian Church v. City of New York*, 293 F.3d 570, 574 (2d Cir 2002)

In this case, NextG is entitled to a preliminary injunction under either standard. NextG is entitled to provide telecommunications services using the public rights-of-way, pursuant to Section 27 of the New York Transportation Corporations Code and Section 253 of the federal Communications Act. Thus, this request does not seek a mandatory injunction, but rather seeks to preserve NextG's *status quo* right to provide telecommunications services using the public rights-of-way, including the utility poles owned by the City therein. However, even if this were considered a mandatory injunction, NextG satisfies the higher standard, as it has a clear and substantial likelihood of success on the merits in light of the City's facial and blatant violation of Section 253

B. Absent A Preliminary Injunction, NextG Will Suffer Irreparable Harm

The irreparable harm to NextG absent the requested injunction in this case is clear and simple. Absent relief, NextG will be prohibited from providing its unique service in the City, period. As a result, its goodwill and business reputation as an entity that is capable of providing the services it offers are being and will be irreparably harmed. (Delsman Aff. ¶¶ 28-32). Being deprived of the ability to enter a market, and harm to a company's goodwill and business reputation are not capable of remedy by damages, and constitute irreparable harm under the Second Circuit's precedent. *See, e.g., Tom Doherty Assocs.*, 60 F.3d at 38; *Air Transp. Int'l LLC v Aerolease Fin. Group, Inc.*, 993 F. Supp. 118, 123 (D. Conn. 1998); *Dunkin' Donuts, Inc. v.*

Dowco, Inc., 1998 U.S. Dist. Lexis 4526, *6-7 (N.D.N.Y. Mar. 31, 1998); *Ahava (USA), Inc. v. J.W.G., Ltd.*, 250 F Supp.2d 366, 371 (S.D.N.Y. 2003).

The timing of NextG's motion does not undermine a finding of irreparable harm. While NextG spent nearly two years seeking access to the public rights-of-way in the City, during that time, representatives of the City repeatedly communicated to NextG that the necessary RFP would be forthcoming in short order. (Delsman Aff. ¶ 13). NextG, in good faith, relied on those representations. Indeed, NextG filed its complaint only after seeking final confirmation from the City that a lawful RFP would not be issued within a matter of weeks. (*Id.* ¶ 18).

While undue delay may sometimes undermine a finding of irreparable harm, in this case there is no unreasonable delay. In this case, NextG was in good faith relying on representations by the City that action would be taken, and also seeking to resolve the matter without resort to litigation. (*Id.* ¶¶ 11-18). Therefore, NextG's situation is analogous to cases where any delay was justified because the movant was undertaking good faith steps to resolve the matter without litigation. *See, e.g*, *King v Innovation Books*, 976 F.2d 824, 831 (2d Cir. 1992); *Innovative Health Sys., Inc. v. City of White Plains*, 117 F 3d 37, 44 (2d Cir. 1997) (over one year delay not unreasonable given attempts to resolve matter without litigation); *Lexington Mgmt. Corp. v. Lexington Capital Ptnrs.*, 10 F. Supp.2d 271, 277 n.4 (S.D.N.Y. 1998); *Eve of Milady v. Impression Bridal, Inc.*, 957 F. Supp 484, 490-91 (S.D.N.Y. 1997)("the requirement that a plaintiff must seek injunctive relief in a timely manner is flexible, and courts looks to the facts of each case to determine the consequences of a plaintiff's delay"); *Encyclopaedia Britannica Ed. Corp. v. Crooks*, 447 F. Supp. 243, 252 (W.D.N.Y. 1978)("delay in raising the infringement question in the courts, caused in part by their attempts to reach an out-of-court compromise solution to a difficult and complex problem, should be commended rather than condemned").

C. NextG Is Substantially Likely To Succeed On The Merits

In this action, NextG challenges, under Section 253 of the Communications Act, 47 U.S.C. § 253, the City's and DoITT's regulatory scheme governing the provision of telecommunications services, both on their face and as applied to NextG. Specifically, the City's franchising scheme and DoITT's regulations implementing the scheme, on their face and as applied, prohibit the ability of NextG to provide telecommunications services, are not related to the management of the public rights-of-way, and are not competitively neutral and nondiscriminatory. Thus they violate Section 253, as interpreted by the Second Circuit in *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67 (2d Cir. 2002), *cert. denied*, 538 U.S. 923 (2003). *See also New Jersey Payphone Assn, Inc. v. Town of West New York*, 299 F.3d 235 (3d Cir. 2002).

1. The Standards Governing The City's Regulatory Scheme Are Well Established

In 1996, Congress passed the Telecommunications Act of 1996 ("1996 Act"), in which it overhauled the Communications Act of 1934 and restructured the regulatory landscape of the telecommunications industry in America. The 1996 Act was enacted to "provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services . . . by opening all telecommunications markets to competition . . . ." *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 493 (2d Cir. 1999) (quoting H.R. Rep. No. 104-458, at 206 (1996)).

A fundamental cornerstone of the 1996 Act's scheme is Section 253(a), which states that

> No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

47 U S C. § 253(a). In *White Plains*, the Second Circuit set forth a clear view of the impact of Section 253(a) First, the court noted, "[c]ourts have held that a prohibition does not need to be

complete or 'insurmountable' to run afoul of §253(a)." *White Plains,* 305 F.3d at 76 (citations omitted). Furthermore, in determining whether an ordinance has the effect of prohibiting the provision of telecommunications service, the Court adopted a test articulated by the Federal Communications Commission ("FCC") that "'considers *whether the Ordinance materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.*'" *Id.* (emphasis added).

The analysis of the Second Circuit comports with that of the Ninth Circuit in *City of Auburn v. Qwest Corp* , 260 F.3d 1160 (9th Cir. 2001), *cert. denied,* 534 U.S. 1079 (2002), in which the Court described Section 253(a) as follows:

> The *preemption is virtually absolute* and its purpose is clear--certain aspects of telecommunications regulation are uniquely the province of the federal government and *Congress has narrowly circumscribed the role of state and local governments in this arena.*

Id. at 1175 (emphasis added) The Second Circuit followed *Auburn,* citing it with approval in striking down the City's Ordinance and Franchise. *White Plains,* 305 F.3d at 81. The simple application of the principles enunciated by the courts compels the conclusion that the City's laws, regulations and requirements regulating the provision of telecommunications service in the public rights-of-way violate Section 253(a).

Indeed, the Court in *White Plains* reviewed the text of an ordinance substantively very similar to those enactments at issue here and "conclude[d] that the Ordinance as a whole violates § 253(a)." *Id.* at 77. Even a cursory comparison of the material provisions of the City's and DoITT's requirements with the provisions of the ordinance analyzed in *White Plains* shows that the City's and DoITT's requirements are substantially similar to if not more overreaching than the legislation struck down by the Second Circuit.

2. **On The Face Of The City's Laws, The City And DoITT Are Granted Unfettered Discretion Over Which Entities Will Be Permitted To Provide Service In Violation Of Section 253(a)**

The Court in *White Plains* found that a "provision that gives the Common Council the right to reject any application based on any 'public interest factors . . . that are deemed pertinent by the City' amounts to a right to prohibit providing telecommunications services. . . . " *White Plains*, 305 F.3d at 76. The Second Circuit, and the Ninth Circuit in *Auburn*, have further clarified that Section 253 prohibits municipal enactments that regulate the entity or its provision of service. *White Plains*, 305 F.3d at 81; *Auburn*, 260 F.3d at 177-78. Those decisions are consistent with prior and subsequent decisions. *See, e.g., TC Sys., Inc. v. Town of Colonie*, 463 F. Supp.2d 471, 483 (N.D.N.Y. 2003); *XO Missouri, Inc. v. City of Maryland Heights*, 256 F. Supp.2d 987, 992 (E.D Mo 2003), *Bell Atlantic-Maryland v Prince George's County*, 49 F. Supp. 2d 805, 814 (D.Md 1999), *vacated on other grounds*, 212 F.3d 863 (4th Cir. 2000).

As the following review demonstrates, the City's and DoITT's regulatory scheme falls squarely within *White Plains* and *Auburn*, by granting the City and DoITT ultimate, unfettered discretion in determining whether to allow "any entities" to provide telecommunications services, and by regulating both the entities and their provision of services.

a. **The Charter**

As described in full above, the City's Charter explicitly grants DoITT and various other City agencies and officials the unfettered discretion described in *White Plains*. For example, Section 1072(c) of the City Charter empowers DoITT to "**select[] telecommunications franchisees**. . " (Charter § 1072(c))(emphasis added). Under Section 363(b) of the Charter, the City must first determine if it believes there is even a "need" for a franchise for the service. (*Id.* § 363(b)) These provisions are the same as the "public interest" provisions struck down in *White Plains*. 305 F.3d at 76. Finally, under the Charter, before any franchise can be finally granted, it must be subject to a public hearing (*id.* § 371), separate approval by the Mayor (*id.* § 372), and review and approval by the Franchise and Concession Review Committee (*id.* § 373). Thus, under the City Charter, the City has unfettered discretion to determine if a service is "needed" and then to deny an entity the ability to provide telecommunications service at numerous stages. Such a scheme facially amounts to a right to prohibit the provision of telecommunications services in violation of Section 253(a). *White Plains*, 305 F.3d at 76.

b. Resolution No. 957

Similarly, Resolution No. 957 has language that closely tracks matters held unlawful, as a matter of law, under Section 253(a). For example, Resolution No. 957 sets forth mandatory criteria that DoITT must use to evaluate responses to an RFP, including: "(1) The adequacy of the compensation;" "(2) the financial, legal, technical and managerial experience and capabilities of the applicant(s);" "(4) the value and efficiency of the public service to be provided; and" "(5) the value of any telecommunications facilities and services offered by the applicant(s) to the City" Yet, it also leaves DoITT significant discretion, as it states the criteria "shall include, **but not be limited to**" those specified. (Res No. 957 p. 2)(emphasis added). Resolution No. 957 also mandates inclusion of specific franchise terms, including:

> "(2) the compensation to be paid to the City shall be adequate and shall include the payment of fees or the provision of facilities and services, or both."
>
> "(11) there shall be provisions to ensure adequate ***oversight and regulation of the franchisee*** by the City;" (Emphasis added).
>
> "(12) there shall be provisions to restrict the assignment or other transfer of the franchise without the prior written consent of the City and provisions to ***restrict changes in control of the franchisee*** without the prior written consent of the City." (Emphasis added).

(*Id.* pp. 2-3). And again, DoITT is provided discretion, as the franchise terms "shall include, **but not be limited to**" those enumerated (*Id*) These provisions place DoITT in the position of picking providers, and grant it the unfettered discretion to prohibit entry and regulate the provision of telecommunications services, in violation of Section 253(a). *See, e.g.*, *White Plains*, 305 F.3d at 76; *Auburn*, 260 F.3d at 1176-79; *Town of Colonie*, 463 F. Supp.2d at 483.

c. The 2004 RFP

The 2004 RFP mirrors Resolution No. 957 in setting up DoITT as the unfettered arbiter of who may provide telecommunications services in the public rights-of-way. First, in three separate provisions, DoITT reserves the right to "select no proposals, one proposal or multiple proposals," (2004 RFP § 2), and to "TO CANCEL OR AMEND THIS RFP AT ANYTIME[sic]" (*id* §3)(emphasis in original). (*See also id* §4(j)). This unfettered discretion over who provides service, by itself and on its face, violates Section 253(a). *White Plains*, 305 F.3d at 76-77.

The RFP's requirement that entities engage in a blind bid, with the highest bidder getting exclusive access to specific Poles (*i.e.*, portions of the public rights-of-way) is on point with the municipal scheme held to violate Section 253(a) in *New Jersey Payphone*, 299 F.3d at 242 ("A bidding competition where the winner is determined by willingness to share a monopoly profit with the Town is clearly not the kind of competition intended by the [Telecommunications Act]")

The RFP's minimum application obligations and the standards that DoITT will use to evaluate applications are also precisely like those struck down in *White Plains*. For example, Section 8(b) of the 2004 RFP requires applicants to disclose: services to be provided and the proposed technology (§ 8(b)(1)); the legal and managerial qualifications of the applicant, and how many providers will be served (§ 8(b)(2)); the financial capability of the applicant (§ 8(b)(3)); and a compensation "offer" to the City (§ 8(b)(4)). Section 8(c) then sets forth the criteria to be used by the "Evaluation Committee" in evaluating each application. The criteria listed mirror those listed in Resolution No 957: *e.g.*, financial, legal, technical and managerial experience, adequacy, amount and value of the proposed compensation to be paid to the City; the value of any telecommunications facilities and services offered to the City; the value, efficiency and scope of the public service to be provided. (*Id.* § 8(c)).

Like Resolution No. 957, these provisions empower DoITT to exercise unfettered discretion over NextG's provision of telecommunications services, and permit DoITT to regulate the provision of services Accordingly, they violate Section 253(a), as a matter of law. *White Plains*, 305 F.3d at 76, 81.

3. The City's Actions Have Prohibited NextG From Providing Telecommunications Services In Violation Of Section 253(a)

NextG has been seeking approval from the City to construct its facilities in the public rights-of-way for two years, since March 2002 (Delsman Aff. ¶¶ 11-18). During that two year period, the City would not even permit NextG to apply for the necessary approvals – rejecting NextG's attempted application. (*Id* ¶¶ 15-18). And, the City has refused to grant or even transfer to NextG a franchise to occupy the public rights-of-way (which the City and its laws assert is required). (*Id.* ¶¶ 15-18, 24-26). The City's actions have prohibited or had the effect of prohibiting NextG from providing telecommunications services in violation of Section 253(a).

Under *White Plains*, the two-year delay, by itself, is sufficient to establish the Section 253(a) violation. 305 F.3d at 76. But even without the delay, the City's steadfast refusal to even allow NextG to apply for, much less grant it a franchise, constitutes a blatant and absolute barrier to entry – perhaps the most blatant seen in any reported case. In *Classic Telephone*, the FCC held that the cities' refusal to grant the telecommunications provide a franchise was a clear barrier to entry in violation of Section 253(a) *Classic Tel., Inc.*, 11 F.C.C.R. 13082 (FCC 1996). Since that early, post 1996 Act decision, municipalities have had the wherewithal not to out-and-out refuse a provider a franchise. Yet, that is precisely what the City has done in this case, and as a result, NextG is substantially likely to succeed on the merits of its Section 253 case.

The City's recent RFP does not alter the analysis. First, as detailed above, the RFP is facially unlawful under *White Plains*. Second, the RFP is illusory. DoITT states three separate times in the RFP, once in all capital letters to emphasize the point, that "DoITT RESERVES THE RIGHT TO CANCEL OR AMEND THIS RFP AT ANYTIME[sic]." (2004 RFP §3)(emphasis in original). Thus, NextG could be forced to go through the expense and delay of responding to the RFP, only to have DoITT either cancel the RFP or decide, for any reason or no reason, not to issue any franchises. The RFP does not undermine the merits of NextG's case, but rather emphasizes NextG's substantial likelihood of success. Finally, as explained above, the timetable of the RFP is practically unworkable. Given the layers of review required, and with no form agreement to work from, it will be impossible for DoITT to review applications, negotiate, and obtain the necessary approvals in the time between the application due date of April 9, 2004 and the expiration of DoITT's authority under Resolution No. 957, on August 11, 2004.

NextG is also substantially likely to succeed on the merits based on the City's discriminatory treatment of NextG For example, the incumbent telephone company, Verizon, is permitted to occupy the public rights-of-way in the City (indeed, NextG believes that Verizon has been permitted to install poles and other structures in the public rights-of-way) without a franchise and without complying with the same fees and regulatory obligations that the City seeks to impose on NextG. (Delsman Aff. ¶¶ 19-21). Verizon is NextG's primary potential competitor, as it already provides carriage alternatives to wireless providers. *Id.* Under *White Plains*, the preferential treatment of Verizon violates Section 253(a), as it materially inhibits

NextG's ability to offer service on a fair and balanced regulatory basis, and exceeds the City's authority under Section 253(c), as it is not competitively neutral. 305 F.3d at 79-80.

NextG has been singled out compared to other providers as well. As described above, the City has previously granted Metricom a franchise to occupy the public rights-of-way and provide telecommunications services in essentially the same manner as NextG proposes. (Delsman Aff. ¶¶ 22-24). Yet, the City refuses to grant NextG permission on the same terms and conditions – unlawful as they may be.[3] (*Id.*) In addition, since Metricom declared bankruptcy and ceased operations, the City has refused to transfer the Metricom franchise to NextG, despite indicating publicly that it intended to transfer it to Aerie Networks.[4] Thus, in addition to denying NextG the same opportunity afforded Metricom, the City and DoITT have refused NextG the opportunity offered to Aerie. (*Id.* ¶¶ 25-26).

Thus, NextG is substantially likely to succeed in demonstrating that it has been singled out in a manner that has materially inhibited its ability to compete on a fair and balanced regulatory and legal basis in violation of Section 253(a). *White Plains*, 305 F.3d at 76, 79-80.

4. Use Of Private Property Is Not An Option, And Is Not A Defense For The City Under Section 253(a)

The City has made clear that its primary position in this case, perhaps its sole position, is that Section 253 does not apply because NextG is, according to the City, a wireless provider who can simply use private property. Thus, the City argues, while its legal scheme clearly is inconsistent with *White Plains*, Section 253(a) does not apply because NextG has alternative

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[3] The terms of the Metricom franchise are unlawful, but NextG was willing to accept them as a form of settlement in order to expedite its entry into the market. (Delsman Aff. ¶ 24).

[4] Again, by seeking this avenue for entry, NextG was not conceding that the franchise was lawful, but rather, was seeking a type of informal settlement of the impasse between it and the City.

ways to provide telecommunications service. The City's argument is incorrect both factually and as a matter of law.

First, NextG is not a provider of wireless communications services. (Delsman Aff. ¶ 8). Rather, NextG provides carriage to wireless providers (*Id*). As described above and in the affidavit of David Cutrer, NextG must have access to the public rights-of-way in order to provide its telecommunications services. (Cutrer Aff. ¶¶ 12-16).

The City's assertion that NextG ***could*** provide telecommunications services using traditional cellular technology misses the point. TCG ***could*** have provided telecommunications services in the City of White Plains by leasing and reselling facilities from the incumbent Verizon under the mandatory facilities-sharing provisions of the Telecommunications Act. 47 U.S.C. §§ 251-252 Yet, that fact did not affect the Second Circuit's holding that the City's actions and laws violated Section 253(a). In other words, under Section 253 a city cannot prohibit an entity from providing telecommunications services via a particular technology based on the theory that the entity could still provide service via another technology. So, even if NextG ***could*** provide some telecommunications services via traditional cellular technologies using private property, the City is nonetheless prohibiting NextG from providing its particular telecommunications service by denying it access to the public rights-of-way.

Second, the City's argument regarding the availability of private property has already been rejected. In *New Jersey Payphone*, the plaintiffs challenged a franchising scheme very similar to the one at issue here. The Town of West New York prohibited the construction of payphones in the public rights-of-way without a franchise. It then set up a scheme whereby an exclusive franchise to use the public rights-of-way would be granted to the applicant submitting the highest compensation bid. 299 F 3d at 242. Like the City here, the Town of West New York argued that its scheme did not prohibit or have the effect of prohibiting the provision of telecommunications services because the non-franchised providers could install payphones on private property, and thus, the City argued, there was no prohibition of service. *Id.* Both the District Court and the Third Circuit rejected the City's argument. They held that the highest bidder scheme clearly violated Section 253, and, regarding the City's private property argument, stated that there was no support for the "inherently implausible proposition." *Id.*

The parallels between the situation held unlawful in *New Jersey Payphone* and the current case are clear, and the same result should apply.

Finally, Under New York law, NextG is a Telephone Corporation, or alternatively a Telegraph Corporation, under the terms of Article 3 of the New York Transportation Corporations Law Under Section 27 of the New York Transportation Corporations Law, NextG has a right and franchise to construct telephone and telecommunications facilities "upon, over or under any of the public roads, streets and highways" and to provide telecommunications services via those facilities. NY Transp. Corp. Law § 27. While under Section 27, NextG is required to obtain "permission" from municipal authorities before it constructs its facilities upon, over or under the public roads, streets and highways, municipal authorities may not deny NextG permission to access the public rights-of-way – regardless of whether private property is available. *See New York Tel Co. v. Town of North Hempstead*, 41 N.Y.2d 691, 693 (1977).

5. The Challenged Provisions And Actions Are Not Within The City's Authority Under Section 253(c)

The City may argue that its actions are within its authority under Section 253(c). Section 253(c) provides that.

> Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and

> nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

47 U.S.C. § 253(c). Under Section 253, the only authority that municipalities may exercise with regard to telecommunications providers is to "manage" the use of the public rights-of-way. *See, e.g., White Plains*, 305 F.3d at 81-82; *Auburn*, 260 F.3d at 1177-78; *Colonie*, 263 F. Supp.2d at 484-85 ("The case law clearly establishes that local regulations which seek to regulate a town's rights-of way are permissible, while local regulations that seek to regulate the provision of telecommunications services or the telecommunications providers themselves, are impermissible"). Thus, the authority reserved to municipalities under Section 253(c) is extremely limited. Both the Second Circuit and Ninth Circuit have held that Section 253(c) "saves" only those municipal requirements that are "directly related to management of the public rights of way" *Auburn*, 260 F 3d at 1178; *see also White Plains*, 305 F.3d at 81.

Following the Second and Ninth Circuit's holdings, NextG is substantially likely to succeed on the merits, as the City's regulations, on their face, are not limited to management of the public rights-of-way. A key issue identified by both the Second and Ninth Circuit as exceeding a municipality's Section 253(c) authority is requirements that regulate the provision of service or the provider itself, not the physical occupation of the right-of-way. *White Plains*, 305 F 3d at 81; *Auburn*, 260 F.3d at 1177-78; *see also Colonie*, 263 F. Supp.2d at 484-85; *Qwest Comm. Corp. v. City of Berkeley*, 255 F. Supp.2d 1116, 1120-21 (N.D. Calif. 2003). As set forth in Part II.C.2, above, the provisions challenged here fail under Section 253(c), as they fall within that category, including the requirements that the franchise provide for oversight of the provider and the provider's services (Res No 957 pp 2-3), and the consideration of matters held unrelated to the management of the public rights-of-way, like legal, technical and financial qualifications (Res. No. 957 p 2).

Moreover, the 2004 RFP facially fails under Section 253(c) because its compensation bidding process fails to publicly disclose the compensation, as well as imposing compensation that is not related to the City's costs or the provider's use of the public rights-of-way. Also, the compensation required inherently is not competitively neutral, as it grants a significant preference to whichever entity is willing to pay the most Accordingly, NextG is substantially likely to succeed on the merits of its claims.

D. NextG Is Entitled To Section 1983 Damages

Given NextG's substantial likelihood of success on the City's violation of NextG's federal rights under Section 253, NextG is also substantially likely to succeed in its claim for damages under 42 U S.C. § 1983. The City has denied NextG of its federal rights, under color of law and pursuant to a policy of the City. And Section 253 sets forth no remedial scheme that would indicate Section 1983 damages were not intended. *See, e.g., Abrams v. City of Rancho Palos Verdes*, 354 F.3d 1094 (9th Cir. 2004)

E. The Balance Of Hardships Tips Decidedly In NextG's Favor, As The City's Interests Can Be Adequately Protected

The final element demonstrating that NextG is entitled to a preliminary injunction is the balance of hardships. As demonstrated above, the hardship to NextG absent the requested injunction is irreparable. By contrast, there is little or no harm to the City, and what possible harm there might be can be more than adequately protected. The sole legitimate issues of concern to the City are (1) management of construction issues (*e.g* , safety), and (2) compensation. NextG will of course comply with any lawful construction management regulations, such as safety codes, insurance, bonding, and repair of the rights-of-way. Regarding compensation, while NextG believes that the maximum compensation that the City may recover is zero in light of its treatment of Verizon, NextG is willing to post a bond to cover the fees that may be found lawful as a result of this litigation. Finally, the City's interests are ultimately protected by the fact that NextG's facilities could be removed if the outcome of this litigation so required. Given that the public interest in competitive telecommunications services and NextG's interest in avoiding irreparable harm can only be protected by granting the injunction, the balance of hardships tips decidedly in favor of the injunction.

III. CONCLUSION AND REQUEST FOR RELIEF

Based on the foregoing, NextG should be granted a preliminary injunction. It faces irreparable harm, has a substantially likelihood of success on the merits, and the balance of harms tips decidedly in NextG's favor.

Accordingly, NextG requests that the Court grant an order, enjoining Defendants from prohibiting NextG from exercising its right to provide telecommunications services using the public rights-of-way. Specifically, NextG proposes to install its fiber optic and antenna facilities in the public rights-of-way leading to up and then on nine utility poles currently located in the public rights-of-way in the City. (Delsman Aff. ¶¶ 33-36). NextG's proposal will allow it to initiate construction and service offerings during the pendency of this action, while not seeking essentially all the relief otherwise requested in the Complaint (*i.e*, City-wide deployment). Moreover, NextG will agree to abide by the City's current right-of-way construction management and safety regulations, as well as post a bond of $50,000 and appropriate insurance. Finally, the wireless devices NextG proposes to install are within the technical parameters set forth in DoITT's 2004 RFP, and as such, would present no conceivable engineering or safety issues.[5] (Delsman Aff. ¶ 36)

[5] NextG does not concede that the parameters are within DoITT's lawful authority, but simply makes the representation to demonstrate the lack of even possible objections by the City.

Respectfully Submitted,

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